STRAITS SETTLEMENTS REPORTS.

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[ORIGINAL CIVIL JURISDICTION]

AITKEN, J.

March 2, 1940.

NAGAMMAL v. SUPPIAH.

[PENANG CIVIL REVISION No. 1 of 1940]

Tamil Hindu custom—whether husband entitled to retain after separation all property given to wife—evidence of Tamil custom.

Held, that in the Straits Settlements among Tamil Hindus there is a custom that whenever a Tamil Hindu wife ceases to live with her husband, whether of her own accord or because he refuses to have her any longer, all that he or his family contributed to the joint establishment reverts to them and all that she and her family contributed to the same reverts to herself and her family and that such custom is clearly proven, definite and reasonable, and that the Courts of the Straits Settlements will give effect to it.

Held, accordingly that the Tamil husband of a Tamil wife who had left him was entitled to retain all the jewellery he had given to such wife upon their marriage.

Further held, that when a question of Tamil customary law comes up in Court for investigation it is not sufficient merely to direct questions to the Court Tamil interpreter but evidence on oath or affirmation on the subject must be taken in the usual way to prove foreign laws or customs.

REVISION.

Plaintiff and Defendant appeared in person.

The facts and arguments sufficiently appear from the judgment.

Aitken, J.—This case came before the Assistant District Judge at Bukit Mertajam on the 24th of November 1939. For some reason or other, possibly owing to an oversight, no copy of the summons has been included in the record furnished to me. However, the nature and extent of the Plaintiff's claim appears clearly enough from the note which the learned Assistant District Judge made of her evidence in the Court below, and which reads as follows:—

> "Plaintiff s.s. Nagammal alias Jeyaseeni, Christian. Mistress of Antony Samy, 105 Kulim Road. I claim from Defendant $80.68 being value of my jewellery and clothes taken away by Defendant about 2 years and 2 months ago, viz. 1 pair gold earrings studded with 7 white stones value $25/–; 1 gold nose-stud with 1 white stone value $3.50; 1 wedding sari value $18/–; another sari value $9.50; 1 pair silver anklets value $9/–; 1 tali, ½ sovereign weight and 2 gold beads, ½ sovereign weight value $15.68. These articles were all given to me by Defendant on the day of my marriage to him. On 4.6.38 Defendant struck me and took away all these articles and drove me from his house. I reported to Labour Department and was advised to return to my husband. I refused as he had ill treated me. I was also advised to see the Panchayats, but I did not do so, not knowing any of them. Defendant claimed for marriage expenses against me at Labour Office. I was told to pay him $90/–. I paid him $5/– about three months ago. Then I issued this summons. I have demanded return of these articles from Defendant. He refused to return them.
> **cross-examined.** I have not still got these articles. I was driven away by you—did not run away of my accord. I handed over all the articles to you."

The defences relied on by the Defendant are set out in the following note which the learned Assistant District Judge made immediately after he had recorded the Plaintiff's evidence:—

> "Defendant considers articles are his because wife ran away—considers he only lent them to Plaintiff for duration of marriage and that as marriage broken by Plaintiff's act, articles should be returned. Tamil Interpreter, Sundram, says this is not Hindu custom, that gifts from husband to wife on marriage are absolute gifts, no matter what subsequent misconduct of wife. Defendant holds articles are his and that they are still with Plaintiff but does not propose to pursue this claim."

After ascertaining from the Defendant what his defences were and making this note, the learned Assistant District Judge proceeded to hear the evidence of a witness called by the Plaintiff, of the Defendant, and lastly of a witness called by the Defendant. Then his note continues—

> "CASE
> Not much to choose between Plaintiff and Defendant as credibility goes."

The learned Assistant District Judge was evidently puzzled at that stage of the case as to what his decision should be, and he recalled the Plaintiff from whom he elicited the following statements:—

> "I became a Christian after marriage to Defendant. Panchayats did decide that I should therefore repay marriage expenses to Defendant. I maintain the Defendant took the jewellery etc. away. I have been living with another man for 2 years. I complained to Controller of Labour about the jewellery in July 1938 and was advised to go to Panchayats. I did not go because I was not married in the presence of the Panchayats. I went to the Panchayats only when Defendant complained to them. I am not legally married to Anthony Samy—he is a Christian. I was driven away by Defendant. I became a Christian after that."

These statements seem to have just tipped the scales of justice in the Plaintiff's favour, for the record concludes—

> "Slight balance in favour of Plaintiff. Judgment and costs $80.68."

Now the learned Assistant District Judge evidently gave his best attention to this case, and tried it fairly and properly. I should certainly not have acceded to

the Defendant's petition for a review of the decision herein had there not been two incidents connected with the trial which appear to raise substantial questions of law:—

> The first is the non-service of a subpoena which the Defendant sued out to obtain the evidence of Mr. G. N. Pillay, an extra Assistant Controller of Labour at Penang; and the second is the Defendant's contention that by Tamil customary law a wife who leaves her husband is not entitled to retain the jewellery given to her by her husband during and in consideration of the marriage.

As to the first of these, I have ascertained (a) that there was no valid excuse for the failure to effect service of the subpoena on Mr. G. N. Pillay, and (b) that his evidence was material to the issues in dispute between the parties and might have tipped the scales of justice the other way. The position therefore is this:—judgment might have gone in favour of the Defendant but for a breakdown in the machinery of justice for which he was in no way responsible. I myself have no power, under section 19 of the Courts Ordinance, to reverse or vary the judgment of the District Court on grounds of fact; and the result is that I must direct a retrial of his case before another Assistant District Judge unless I can dispose of it on the point of Tamil Customary Law.

As to the point of Tamil Customary Law, it seems to me to deserve and require rather more investigation than a question directed to the Court Interpreter, whose statement in answer thereto was accepted by the learned Assistant District Judge though neither given on oath nor tested in any way by cross-examination or otherwise. I appreciate the difficulties which confront an Assistant District Judge when a point of national or tribal customary law suddenly emerges during the progress of a case; but if the Court has to rely on an Interpreter for evidence on any such point, it should be careful to take that evidence on oath or affirmation in the usual way, and to permit either party to cross-examine the witness and to adduce rebutting evidence if he or she so desires.

I gather that both parties in this case are of the Kallah caste, and professed the Hindu faith or religion at the time of their marriage. Either shortly before or shortly after she ceased to live with the Defendant as his wife the Plaintiff became a convert to Christianity, and that act on her part has tended to complicate this issue in regard to Tamil custom.

Mr. Govinda Narayan Pillay, an Assistant Controller of Labour at Penang, gave evidence before me as to Tamil custom as follows:—

> "The question as to whether a Tamil husband is entitled to have the jewellery which he has given his wife during marriage returned to him in the event of his wife deserting him depends on the caste of the parties and the locality. I was told that Suppiah and Nagammal are both of the Kallah caste.
>
> (Both Suppiah and Nagammal agree that they are of the Kallah caste.)
>
> The custom amongst people of the Kallah caste is that all jewellery given by the husband to the wife must be returned by the latter if she deserts her husband.
>
> In this particular case the woman had changed her religion, and according to Hindu custom, irrespective of any caste or locality, a woman who has changed her religion has no right to retain any jewellery given to her before she changed her religion."

In addition to giving this evidence in Court, Mr. G. N. Pillay has drawn my attention to the following passages in *Thurston's* Castes and Tribes of Southern India, Volume V page 39 in regard to the marriage customs of "Kallahs, or Maravars, or Agamudaiyans":

> "Should it so happen that the husband, after the tying on of the 'Tali' in the first instance, dislikes the object of his former choice, then the people of their tribe are assembled; she is conducted back to her mother's house; sheep, oxen, eating-plate, with brass cup, jewels, ornaments and whatever else she may have brought with her from her mother's house, are returned; and the tali, which was put on, is broken off and taken away.
>
> "If the wife dislikes the husband, then the money he paid, the expenses which he incurred in the wedding, the tali which he caused to be bound on her, are restored to him, and the woman, taking whatsoever she brought with her, returns to her mother's house, and marries again at her pleasure."

I also invited Mr. V. Nadason Pillay, J.P., who is the recognised Head of the Tamil community in this Settlement, to give me the benefit of his evidence on the subject, and he kindly consented to do so. I think the whole of his evidence is worth setting out in this judgment, especially as it seems clear that if his view of Tamil custom had been adopted when the Plaintiff, Defendant and the Plaintiff's lover were all before the Assistant Controller of Labour, these proceedings in the District Court at Bukit Mertajam would never have taken place.

Mr. V. Nadason Pillay gave evidence before me as follows:—

> "I have been living at Penang for about 50 years now and am a Justice of the Peace. I have a considerable knowledge of Tamil Hindu customs. Such customs vary as between the different castes, but not much.
>
> Yes, it is customary for a Tamil husband to give some jewellery to his wife when they are married: that custom holds good in regard to all castes.
>
> If a wife deserts her husband, then the jewellery which he has given to her—all of it—reverts to the husband. This custom applied in the case of all castes.

If it is the husband who drives the wife away, even in that case the jewels must revert to the husband because they belong to him. That custom is common to all castes. Should the wife have been unjustly driven away, she will be entitled to maintenance from her husband.

It is not customary for Tamil Hindus to marry more than one wife, but if there is no child of a marriage the husband can marry a second wife even though the first is still alive.

When a Tamil Hindu marriage takes place, at the betrothal ceremony all the jewels and other articles which the husband is giving the wife are displayed to all relatives, friends and acquaintance invited. The Brahmin priest will show them to all such friends and relatives, and will then write them down in the Register of Marriages kept by the Hindu Endowments Board with their respective values. Then he will read out three times the list he has made, and announce to all those assembled there that those jewels and other articles have been given by the bridegroom to the bride.

Next the father of the bridegroom and the father of the bride, and a few other respectable persons present, will be asked to sign the list as witnesses. I myself have signed more than 90 such lists.

Next certain ceremonies are performed, and then the jewels etc. are handed by the bridegroom's father to the bride's father. These jewels etc. are regarded as belonging to the husband though the bride is to have the use of them during the marriage. On the other hand if jewels and other articles are given to the bride by her own father or any other relative of hers, those jewels and articles become the bride's own property and cannot be taken by the husband.

If a wife is faithful and loyal, no husband will drive her out. Even though a wife deserts her husband or is driven away by him, the marriage continues, that is, the husband can marry again but not the wife. Once a woman has been married and the tali tied, no other man can marry her and she can only be a mistress. Once a woman has run away from her husband the marriage no longer exists for him, and he can marry again.

The Tamil Hindu customs which I have explained to the Court are those which I have known for many years. I am of the Bellala caste myself.

If a Tamil Hindu wife deserts her husband, there is no definite custom about the marriage expenses. But if a Tamil wife deserts her husband and goes to live with another man, I have known some cases in which that man has been ordered to repay to the deserted husband part of the latter's marriage expenses. This is comparatively rare, however, and in most of such cases the man to whom the woman goes pays nothing. There is no universal custom amongst Tamil Hindus for the man who takes some one else's wife to pay the husband his marriage expenses."

And now I must venture forth on ground so dangerous that any judge, however bold he may be, would walk upon it delicately and with fear and trembling. My first hesitating step will be to announce that, in my opinion, a national or tribal custom must be (a) clearly proven (b) definite, and (c) reasonable before a British Court of Justice can give effect to it.

Having ventured so far I must next go a good deal further, and attempt the extremely dangerous and difficult task of formulating local Tamil custom in regard to the jewels and other articles which are nearly always handed over, to use a neutral term, by the bridegroom to the bride at the betrothal ceremony.

On the evidence before me I am satisfied that, by Tamil custom, all such jewels are regarded as reverting to the husband not only if the wife deserts him of her own accord, but even if he drives her away. This custom I consider to be definite and clearly proven, and the next question is, 'can it be regarded as reasonable, and if so, to what extent.'

In considering whether a Tamil custom is reasonable, I think it would be a mistake to apply European standards, ethics, beliefs, prejudices or modes of thought to the solution of that problem. Once again I find myself compelled to hazard an opinion on this very difficult question as to the right way to approach the problem, and only do so because I have got to decide whether or no this particular local Tamil custom is reasonable.

Let me say, then, that I have first of all asked myself the question, 'is this custom inconsistent with modern views and trends of thought amongst the Tamil community in this Settlement.' In my opinion the answer to this question is in the negative.

Next I have asked myself the question, is it contrary to that vague sense of what is fair and decent which we call, for want of a better name, "natural justice." Here again in my opinion the answer is in the negative, because the underlying principle appears to be this:—whenever a Tamil wife ceases to live with her husband, whether of her own accord or because he refuses to have her any longer, all that he or his family contributed to the joint establishment reverts to them, and all that she and her family contributed to the same reverts to herself and her family. I cannot see anything contrary to natural justice in that principle, and it does not affect the question of alimony.

Having come to this conclusion on the customary law issue involved in this case, I can deal with it myself because there is no doubt whatever that the parties ceased to live together nearly two years ago, and that the Plaintiff has refused more than once to return to the Defendant as his wife. That being so, the Defendant was entitled to retain the jewels and other articles of adornment which he gave to the Plaintiff at the betrothal ceremony, and it seems clear on the evidence before me that it is these jewels and articles, and these only, which the Plaintiff sought to recover in these proceedings. I therefore set aside the judgment which the learned Assistant District Judge gave

for the Plaintiff, and direct him to enter judgment for the Defendant in its stead.

As to the costs of these proceedings, I have decided to make no order. If the defendant had not induced the Assistant Controller of Labour to interfere on his behalf and take steps to render the Plaintiff's paramour liable to repay the Defendant's marriage expenses, I am tolerably certain that the Plaintiff would never have taken action in the District Court against the Defendant. The Plaintiff is obviously under the mistaken impression that the agreement which the Assistant Controller of Labour induced her to sign rendered her, as well as her paramour, liable to repay those expenses; and before me she stated, quite frankly, that the loss of her paramour's society and support, which was one of the results of that agreement, led her to make a compensating claim, so to speak, in the District Court. According to Mr. V. Nadason Pillay the Assistant Controller of Labour was not acting in accordance with Tamil custom when he took the steps which he did take to recover the Defendant's marriage expenses from the Plaintiff's paramour; and I doubt very much whether the written agreement to pay the same could be enforced against the latter. My advice to all the three parties concerned in these disputes is to leave one another alone and keep away from Law Courts, Panchayats and Controllers of Labour for at least two years.

Order accordingly.

[ORIGINAL CIVIL JURISDICTION]

MANNING, J.

February 23, 1940.

IN RE YAP TECK HEE deceased.
YAP PONG SAI & OTHERS
v.
TAN SEE TIONG & ANOTHER.

[MALACCA SUIT No. 46 of 1938]

Limitation —Will—Suit for administration, with claims for breach of trust and wilful default—Third party receiving trust property with notice of trust—Express trustee—Limitation Ordinance (Cap. 16), art. 99—Limitation period—S. 18—Acknowledgement—S. 9—Suit againt trustee.

The Court will look at the substance of an action rather than its form or the remedies actually prayed, to ascertain the period of limitation applicable thereto.

In a suit by beneficiaries under a will (who have not received their shares and legacies from the testator's estate) claiming in respect of breaches of trust, wilful default, and administration of the estate, against the executor and a person to whom the trust property had been assigned under circumstances which make him liable as an express trustee the period of limitation applicable is 12 years, under art. 99 of the Limitation Ordinance, for such an action is in substance a suit for a legacy or share or residue under the will.

An acknowledgment by an executor of his duty to account in the ordinary way is not such an acknowledgment as will operate as the beginning of a new period of limitation in a action against him for breach of trust or accounts on the footing of wilful default.

An action by a beneficiary against an executor who has received the testator's property and disposed of it, for the purpose of making him account for such property, and hand over to the plaintiff what may be found due as the result of the account, is a suit which cannot be barred by any length of time under the Limitation Ordinance.

If a stranger to the trust receives trust property under a breach of trust in which he concurs with the trustee, he must himself be treated as an express trustee and a suit against him for such property would not be barred by any length of time (following **Soar v. Ashwell** (1893) 2 Q.B. 390).

Cases referred to:—

(1) *Dassi v. Bose,* I.L.R. 30 Cal. 369.

(2) *Dewraj & ors. v. Nursey & ors.* I.L.R. 8 Bom. 432.

(3) *Soar v. Ashwell,* (1893), 2 Q.B. 390.

ACTION.

The facts and arguments appear sufficiently from the judgment.

E. R. Koek (*T. D. Talukdar* with him) for plaintiffs.

S. C. Goho (*D. Bannerjea* with him) for defendants.

[In addition to the authorities mentioned in the judgment, the following cases were cited: for the plaintiffs, **Khaw Sim Tek v. Chuah Hooi Gnoh Neoh** (1922) 1 A.C. 120; **Kasivisvanathan Chettiar v. Chokalingam Chettiar** (1935) A.C. 163; for the defendants, **Tholosingam Chitty v. Vedachellaiyah** A.I.R. (1918) Madras 624; **Lacons v. Warmoll** (1907) 2 K.B. 350.]

Cur. Adv. Vult.

Manning J.—The plaintiffs are five of the beneficiaries under the will of Yap Teck Hee, hereinafter referred to as the deceased, who died on the 18th June 1920. The defendant, Tan See Tiong, hereinafter called the 1st defendant, was one of the executors of the will and probate was granted to him on the 13th August 1920. Only two of the beneficiaries have received anything under the will and it is now alleged that the 1st defendant was guilty both of mal-administration of the estate and of breaches of trust and it sought to make him restore the value of